vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5856 OF 2005

Balmohan Vidhya Mandir Trust & Ors. ... Petitioners

V/s.

Neelkanth alias Sharad Shivram Rege & Ors. ... Respondents

Mr.Y.S. Jahagirdar for Petitioners
Mr.P.G. Karande for Respondent No.4

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **SEPTEMBER 20, 2005**

P.C.:

. This petition challenges the order of the trial Court allowing the interim notice filed by Respondent No.4. The trial Court has thereby allowed the prayer of Respondent No.4 and stayed the hearing of the suit till the disposal of the appeal No.436 of 1999 filed on the original side of this Court.

2. The Petitioners had filed a suit before this Court for a declaration that Respondent No.4 was a trespasser in the suit premises. This Court while dismissing the suit held that Respondent No.4 was in possession of the suit premises as a tenant. These findings of the learned Single Judge of this Court have

been challenged in an appeal filed by the Petitioners being Appeal No.436 of 1999. That appeal is pending. During the pendency of the appeal, the petitioners have approached the Small Causes Court by filing RAD Suit No.660 of 1999 for a declaration that the Petitioner-Trust i.e., Balmohan Vidhya Mandir Trust is a tenant of the suit premises. Respondent No.4 was a party defendant in that suit.

3. It is the case of Respondent No.4 that the proceedings before this Court in Suit No.1773 of 1987 which are now continued in the appeal are substantially the same as the proceedings before the trial Court. According to Respondent No.4, there is, if not an identity of issues before the trial Court i.e., the Small Causes Court and before this Court in the appeal, at least a similarity. Is contended that under section 10 of the Code of Civil Procedure, the matters in both the suits must be directly and substantially identical. Reliance is placed on the Division Bench judgment of this Court in the case of *Jai Hind Iron mart v/s. Tulsiram Bhagwandas,* **AIR 1953 BOMBAY 117** to substantiate his submission. It is contended that although in the present case there may not be complete identity of issues between the two suits, the subject matter in issue must is substantially the same and, therefore, the

provisions of section 10 were invoked before the trial Court. Section 10 of the Code reads thus:

> 10. Stay of suit. - No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

4. The provisions, therefore, stipulate that the trial of the suit can be stayed if the matter in issue in the suit is directly and substantially the same as in a previously instituted suit between the same parties, pending in the Court having jurisdiction to grant the relief claimed in the suit.

5. In my view, this submission of the learned Counsel for Respondent No.4 cannot be accepted. The suit filed before this Court was for a declaration that Respondent No.4 was a trespasser in the suit premises. This Court, therefore, with respect, had only to decide whether Respondent No.4 was a trespasser or not. Furthermore, there was no issue raised in that suit in respect of the status of the petitioners who were the

plaintiffs as tenants in the suit premises. The Petitioners in the present suit filed before the Small Causes Court have claimed the declaration that they are tenants of the suit premises. Therefore, in my view, there is no similarity of the issues nor are the issues directly and substantially related. Furthermore, the Small Causes Court is the only Court which can give a declaration that the Petitioner is a tenant of the suit premises.

6. A contention is raised that the Petitioners have an alternate remedy available to them under section 29 of the Maharashtra Rent Control Act. The order impugned is a procedural order and, therefore, a revision does not lie.

7. In my opinion, there is therefore, no need to stay the trial before the Small Causes Court. Petition is accordingly allowed. The impugned order passed by the trial Court is set aside. The trial shall continue in accordance with law.